

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN THOMAS ENTLER,)
Plaintiff,) CASE NO. C10-0848-RAJ-MAT
v.)
RICHARD ADAME,) REPORT AND RECOMMENDATION
Defendant.)

Pro se plaintiff John Thomas Entler, proceeding *in forma pauperis*, brings a 42 U.S.C. § 1983 civil-rights action, alleging that he suffered retaliation at the hands of corrections officer Edward Adame for having exercised his First Amendment right to grieve improper conduct by Officer Adame. (Dkt. 8, at 24.) Officer Adame moves to dismiss and to stay discovery while the present motion is being considered. (Dkt. 12.) The Court recommends **DENYING** Officer Adame’s motion to dismiss and to stay discovery, and **DIRECTING** defendant to file a written answer to the complaint within thirty (30) days of the date of the order adopting this Report and Recommendation.

BACKGROUND

Mr. Entler is presently incarcerated in the Washington State Reformatory, Monroe

01 Correctional Complex. In 2009, Mr. Entler apparently had been granted “priority access” to
 02 the law library. (Dkt. 8, at 16.) According to Mr. Entler, Officer Adame refused to let him
 03 use this priority access. (*Id.*) Mr. Entler states that before filing a formal grievance against
 04 Mr. Adame, he tried to resolve his concerns informally through complaining to supervisory
 05 personnel in excess of 100 times. (*Id.*) How Officer Adame responded to Mr. Entler’s
 06 complaints forms the basis for Mr. Entler’s claim of retaliation.

07 First, Mr. Entler contends that Officer Adame infacted him falsely twice, once in
 08 January 2009 and once in February 2009 in retaliation for complaining about Officer Adame’s
 09 conduct. (*Id.* at 17–19, 24.) On both occasions, Mr. Entler was found to be not guilty of the
 10 infractions. Mr. Entler states that he then filed a formal grievance against Officer Adame for
 11 the false infractions but was persuaded by Correctional Unit Supervisor (“CUS”) Miller to
 12 retract his grievance because CUS Miller “would personally remedy C/O R. Adame’s behavior,
 13 and I preserved the right to reinitiate the grievance process if C/O R. Adame continued to harass
 14 and retaliate against me.” (*Id.* at 20.)

15 Second, Mr. Entler contends that Officer Adame entered into a pattern of conduct that,
 16 while at times technically justified, constituted a pattern of harassment and retaliation for Mr.
 17 Entler’s complaints. (*Id.* at 20–23.) Specifically, Mr. Entler alleges that Officer Adame
 18 (1) continued to not let him out of his cell for priority access, (2) intentionally refused to allow
 19 him out of his cell to get ice, (3) made him violate the prison policy against leaving personal
 20 property outside his cell through selective enforcement of rules, and (4) singled him out for
 21 punishment by arbitrarily keeping him in his cell all night. (*Id.* at 24.)

22 In lieu of filing an answer, Officer Adame filed a motion to dismiss and to stay

01 discovery pending resolution of the motion. (Dkt. 12.)

02 DISCUSSION

03 Officer Adame contends that Mr. Entler fails to state a claim upon which relief may be
 04 granted because he cannot plausibly support a civil-rights action for retaliation. Under Federal
 05 Rule of Civil Procedure 12(b)(6), Mr. Entler's complaint is construed liberally and all
 06 well-pleaded facts are taken as true. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
 07 (9th Cir. 2001). Conclusory allegations of law, unwarranted deductions of fact, and
 08 unreasonable inferences are, however, insufficient to defeat a motion to dismiss. *Ove v.*
 09 *Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). "To survive a motion to dismiss, a complaint must
 10 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
 11 its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
 12 550 U.S. 544, 570 (2007). In order to sustain an action under § 1983, a plaintiff must show
 13 that he suffered a violation of rights protected by the Constitution or created by federal statute,
 14 and the violation was proximately caused by a person acting under color of state or federal law.
 15 *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

16 Construing Mr. Entler's complaint liberally and accepting his factual allegations as true,
 17 the Court finds that he has stated a plausible claim for retaliation regarding a prisoner's First
 18 Amendment right to seek redress for perceived wrongs. *See, e.g.*, Report and
 19 Recommendation, at 10–15, *Entler v. Perales*, C07-5167-FDB-KLS (W.D. Wash. Oct. 8, 2008)
 20 (concluding, on defendants' motion for summary judgment, there was a genuine issue of
 21 material fact as to one defendant regarding whether Mr. Entler was infracted in retaliation for
 22 his exercise of First Amendment rights); Summary Judgment Order, at 1, *Entler v. Bolinger*,

01 C05-5122-FVS (E.D. Wash. Mar. 21, 2008) (concluding there was a genuine issue of material
 02 fact regarding defendant's motivation for issuing a minor infraction to Mr. Entler and
 03 confiscating his property). The Court recommends denying Officer Adame's motion to
 04 dismiss and to stay discovery pending resolution of the motion.

05 Whether a state prisoner states a claim of retaliation against a corrections officer for
 06 retaliating against him for exercising his First Amendment rights to file prison grievances and
 07 pursue civil-rights litigation is well-travelled terrain and Officer Adame has failed to introduce
 08 any new points of interest to suggest that this action should be turned back on a motion to
 09 dismiss:

10 Within the prison context, a viable claim of First Amendment retaliation entails
 11 five basic elements: (1) An assertion that a state actor took some adverse action
 12 against an inmate (2) because of (3) that prisoner's protected conduct, and that
 13 action (4) chilled the inmate's exercise of his First Amendment rights, and
 14 (5) the action did not reasonably advance a legitimate correctional goal.

15 *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). Mr. Entler has pleaded facts that
 16 satisfy this standard: (1) Officer Adame falsely infacted him and attempted to limit his
 17 movement and to discredit him in the eyes of prison authorities (2) because of (3) Mr. Entler's
 18 attempts to access the law library and complaints regarding Officer Adame's conduct, and
 19 Officer Adame's actions (4) chilled Mr. Entler's exercise of his First Amendment rights, and
 20 (5) the actions did not reasonably advance a legitimate correctional goal.

21 Officer Adame's arguments to the contrary have been soundly rejected by the Ninth
 22 Circuit. Officer Adame argues that Mr. Entler cannot show that Officer Adame's actions had a
 23 chilling effect because Mr. Entler continues to be an outspoken critic regarding perceived
 24 injustices and since January 2009 has filed at least fifteen complaints. (Dkt. 12, at 4–5.)

01 However, “[a]s we have stated multiple times, a retaliation claim may assert an injury no more
02 tangible than a chilling effect on First Amendment rights. . . . Thus, the mere *threat* of harm
03 can be an adverse action, regardless of whether it is carried out because the threat itself can have
04 a chilling effect.” *Brodheim v. Cry*, 584 F.3d 1262, 1269–70 (9th Cir. 2009) (citation and
05 internal quotation marks omitted). In *Rhodes*, the Ninth Circuit made clear that an allegation
06 that a person of ordinary firmness would have had his First Amendment rights chilled is
07 sufficient to state a retaliation claim. *Rhodes*, 408 F.3d at 568–69. “Because it would be
08 unjust to allow a defendant to escape liability for a First Amendment violation merely because
09 an unusually determined plaintiff persists in his protected activity, [plaintiff] does not have to
10 demonstrate that his speech was actually inhibited or suppressed.” *Id.* at 569 (citation and
11 internal quotation marks omitted). Officer Adame also argues that he is entitled to qualified
12 immunity. That argument is foreclosed by the Ninth Circuit’s recognition that the prohibition
13 against retaliatory punishment is clearly established law, and that a reasonable officer would
14 believe that falsely infracting an inmate and attempting to limit his movement and to discredit
15 him would be unlawful. *See id.* at 569–70; *cf. Brodheim*, 584 F.3d at 1269–71 (holding that
16 there was a genuine issue of fact for trial and noting that a prison official’s mere warning a
17 person to stop doing something carries the implication of some consequence of a failure to heed
18 that warning).

19 ///

20 ///

21 ///

22 ///

CONCLUSION

02 The Court recommends **DENYING** Officer Adame's motion to dismiss and to stay
03 discovery, and **DIRECTING** defendant to file an answer to the complaint within thirty (30)
04 days of the date of the order adopting this Report and Recommendation.

DATED this 26th day of October, 2010.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge